

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 179 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

RAMESH DEVCHAND PALA

Versus

JAYANTKUMAR GORDHANDAS MADANI

Appearance:

MR MB GANDHI for Ms. Yamini Desai for Petitioner
MR SURESH M SHAH for Respondent No. 1

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 06/02/98

ORAL JUDGEMENT

This Revision Application is directed against the order dated 20.1.1988 passed by the Second Extra Asstt.Judge, Junagadh whereby the learned Judge set aside the order of the second Civil Judge (SD), Junagadh below exh.5 in RCS No.599/97 dated 25.11.1997 and granted injunction below Exh.5 directing the defendants to

handover the vacant and peaceful possession of Shop No.8 situated in Balkrishna Market, Haveli Gali at Junagadh City within 10 days as a tenant of the suit shop.

2. The question posed in this Revision Application is whether a tenant who has been thrown out by the landlord in a high-handed manner indisregard to the rules recognized in a civilized society, is entitled to interim relief by way of mandatory injunction for restoration of possession pending suit? While the learned Trial Judge answered the question posed in negative, the Appellate Judge observing that in such a situation, the Courts cannot sit and watch the proceedings as a silent spectator and show its helplessness, answered the question in affirmative. The learned Judge, while granting relief of restoration of possession by interim order, has placed reliance on various decisions of the Apex Court i.e. AIR 1990 SC 867 and AIR 1989 SC 2097.

3. The necessary facts are that respondents No.1 and 2, the original plaintiffs were in possession of the suit shop as tenants of respondent No.3-Soni Ramniklal, original defendant No.1, on a monthly rent of Rs.125/per month. It is alleged that movable property worth Rs.80,000/- was lying in the suit shop. On 10th November, 1997, the defendant i.e. the landlord defendant No.1 and the petitioner-original defendant No.2 forcibly dispossessed the original plaintiff tenants by broke open the door, entered illegally, removed the articles from the shop and removed the board of the plaintiff's shop. An FIR in this regard was immediately lodged at the police station at Junagadh on 11.11.1997 which has been registered as CR No.432/97. The plaintiffs also filed a suit under section 6 of the Specific Relief Act for recovery of possession of the shop. Along with the suit an application for interim mandatory injunction was also filed under Order 39 Rule 1 and 2 read with section 151 of the Civil Procedure Code. The plaintiffs also stated that they smelling some foul play between the defendant No.1 and 2, filed a suit for declaration and permanent injunction. The said suit was filed on 4.11.1996 in the Court of Joint Civil Judge (SD). It was stated therein that the plaintiff got information that the defendants No.1 and 2 have entered into some illegal transaction with respect to the suit shop. An injunction was granted by the Court restraining the defendants not to interfere with the possession of the plaintiffs. Petitioner-defendant No.2 filed a pursis Exh.28 stating therein that he has nothing to do with the suit shop and no transaction is made with respect to the suit shop. In view of this statement, the suit was

withdrawn with liberty to file fresh suit. It was contended that undisputedly, the plaintiffs were in possession in the suit shop till they were unlawfully dispossessed on 10.11.1997. Thus, according to the plaintiffs a *prima facie* case is in their favour. It was also contended that the plaintiffs were carrying on their business in the suit shop for the last more than 9 years and they have been abruptly thrown out and they have been deprived of their only source of livelihood. Thus, if the injunction is not granted, they will suffer irreparable injury which cannot be compensated in terms of money. Balance of convenience is also in favour of granting interim injunction in mandatory form to continue the business of the plaintiff in the suit premises which they were carrying on for last more than 9 years. This application was contested by the respondent. It was stated that the plaintiffs have voluntarily handed over possession of the suit shop. It was also stated that a sum of Rs.30,000/- was given on loan by the defendant No.2 to the plaintiffs and they consented to repay the loan in instalments and an undertaking in this regard was given that if they do not pay the amount as agreed, they would hand over possession of the suit shop to the defendant No.1. The plaintiffs failed to repay the loan amount within one year i.e. by 10.11.1997. In view of this, the plaintiffs voluntarily delivered the possession on 10.11.1997. After the vacant possession was delivered to the defendant No.1, the suit shop was rented out to the petitioner-original defendant No.1 on a monthly rent of Rs.150/-. The application for interim relief below Exh.5 was rejected by the order of the Joint Civil Judge (SD), Junagadh on 25.12.1997. The Appellate Court examined the entire matter in great depth and detail and found that the version of the original defendant No.2 is not believable. The learned Judge, on perusal of the pleadings in the previous suit i.e. the suit which was filed on 4.11.1996, found that the petitioner-defendant No.2 specifically denied the allegation of money transactions with respect to the suit shop. The parties did not utter a word with respect to the story of loan of Rs.30,000/- in that suit. In the opinion of the learned Judge, the version given by the defendant No.2 in the previous suit is *prima facie* an admission under section 17 of the Evidence Act. The learned Judge also looked into the documents and found them to be suspicious. The learned Judge, after looking into other documents and evidence found that there was a strong *prima facie* case against the plaintiffs. The learned Judge, relying on a judgment reported in 1995 (2) GLR 1369 wherein it is held that the interim prohibitory injunction restraining the defendants from interfering with the plaintiff's

possession can be granted under Order 39 Rule 1 and 2 of the CPC as well as under sections 6 and 37 of the Specific Relief Act, 1963 granted injunctions. The Court also relied upon a decision reported in AIR 1970 SC 846.

4. It is contended by Mr M B Gandhi, learned Advocate appearing for the petitioner that the learned Extra Asstt. Judge has exceeded the jurisdiction in granting the injunction in a mandatory form, inasmuch as that no Appeal under Order 43 (1) (r) of the CPC was maintainable. It is submitted that it is not in dispute that the plaintiffs were not in possession of the suit premises on the date of filing of the suit, and therefore, the mandatory injunction even in extreme cases, could not have been granted restoring possession prior to filing of the suit. He submitted that such an injunction cannot be granted under Order 39 Rules 1 and 2 of the CPC. He placed reliance on a decision of the Apex Court in the case of ANUP ENGINEERING LTD v. SHREENARAYAN KANAYALAL, reported in 1995 (1) GLH 345. It is held therein that interim relief cannot be granted by deciding the main issue at interlocutory stage when the main issue is required to be decided finally in the pending proceedings. The said matter pertains to the payment of wages to the workman. It is further submitted that the learned Judge committed material illegality in exercise of jurisdiction in granting mandatory injunction under section 6 of the Specific Relief Act in disregard to the provisions of sub-section (3) of Section 6. It is submitted that sub-section (3) prohibits any appeal from any order or decree passed in any suit instituted under section 6 of the Specific Relief Act. On the facts of the case, Mr Gandhi submitted that the petitioner has been lawfully inducted by the landlord executing lease deed. He has also paid rent for three months. He has started running business in the said shop. He also submitted that it was wrong on the part of the learned Judge to say that the defence of the defendant was suspicious. On the other hand, Mr S M Shah, learned Advocate appearing for the Caveator respondents No.1 and 2 took a serious objection to raising the plea of maintainability of the appeal in view of sub-section (3) of section 6 of the Specific Relief Act as the said contention was not raised before the First Appellate Court. On the merits of the case it is submitted that the defence put forward by the original defendants is false and unbelievable even on its first look. The story has been concocted to cover up the illegal and high-handed act.

5. Dealing with the contention of the

maintainability of the Appeal before the joint Extra Asstt. Judge, it is not in dispute that the suit has been filed under Section 6 of the Specific Relief Act, 1963 (for short, 'the Act') and by an interim order, restoration of the possession existed prior to the filing of the suit is sought. In view of this fact, no injunction can be said to have been granted under the provisions of Order 39 Rules 1 and 2 of CPC. However, in my view, the court has ample power under Section 6 of the Specific Relief Act, to grant interim relief by directing to restore the possession which existed immediately before filing of the suit i.e. before the alleged act of removal by unlawful means. It is true that there is no express provision of granting interim relief for recovery of possession. Section 6 of the Act provides for suit by person dispossessed of immovable property. It is a special and speedy remedy for a particular kind of grievance viz; to replace in possession, a person who had been evicted from immovable property of which he had been in possession otherwise than by due process of law. The plaintiff is only required to prove his previous possession and if he succeeds in doing so, he would be entitled for a decree for restoration of possession from the defendant who has dispossessed him. The object is to check the tendency of recovery of possession of property by taking law in hand. Limitation for filing the suit is six months. In a case where there is sufficient material on record to show that the plaintiff was in previous possession and he has been dispossessed unlawfully, grave injustice would be caused if such a person is told that the Court is not competent to grant immediate interim relief by way of restoration of possession. The Court which has ultimate power to pass decree for possession as necessarily power to give such relief by interim order unless its is prohibited. There is no prohibition under section 6 of the Act to grant interim relief. The Apex Court in the case of SAVITRI v. GOVIND SINGH, reported in AIR 1986 SC 985, held that every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. The Court found that this principle is embodied in the maxim 'ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest' (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). The Court held thus, "whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment." The Court considered provisions of section 125 of the Criminal Procedure Code and having regard to the jurisdictional exercise by the

Magistrate interpreted provisions as conferring power by necessary implication on the Magistrate to pass an order granting interim maintenance pending disposal of the application. Looking to the objectives of the provisions of section 6 of the act and the nature of the summary proceedings, a contrary view is likely to result in grave hardship, inasmuch as a person who has been ousted from the premises by unlawful means, will remain outside the premises and continue to face hardship and the wrong doer will enjoy till the culmination of the suit proceedings. It is of course true that such power is to be exercised by the Court with great care and caution and only in the rare and exceptional case. The plaintiff is required to show more than just *prima facie* case that he was in lawful possession of the subject premises just before he was evicted unlawfully. Thus, the Court has power under section 6 of the Act to grant interim relief by directing restoration of possession pending disposal of the suit.

6. Next, the question arises is as to whether an appeal against an interim order passed under section 6 of the Act is maintainable? In my view, the appeal against the order granting injunction outside Order 39 Rules 1 and 2 of CPC is not maintainable under Order 43 Rule 1 of CPC. However, the contention of the petitioner cannot be entertained as the same was not raised before the First Appellate Court. Ordinarily there may not be any difficulty in entertaining such submissions as it goes to the very root. But there are two reasons for not permitting the petitioner to raise this contention. Firstly, if such contention was raised before the First Appellate Court, the plaintiff could have withdrawn the appeal and availed the remedy of Revision before this Court. Thus, if the petitioner is permitted to raise this contention, a serious prejudice will cause to the plaintiffs. Of course, in such a situation, this Court has still power to *suo motu* treat the appeal before the First Appellate Court as Revision before this Court, but I am not inclined to adopt that course. It is equally the settled position of law that a Court will not exercise power under Section 115 CPC, if it results into perpetuating injustice. This Court would be jealous to see a person taking law into his hands. Thus, entertaining the petitioner's contention, the result which will have an effect of benefit to a person who has *prima facie* found to have taken the law in his hands, cannot be permitted to take benefit of technical plea and has to be met on the technical ground that he has not raised such plea before the First Appellate Court.

7. So far as the facts of the case are concerned, it

is admitted that the plaintiff-respondent No.1 was in continuous peaceful possession of the suit shop till 10.11.1997 when he alleged to have been dispossessed. It is also not in dispute that a suit was filed by the same plaintiff on 4.11.1996 stating that he apprehended transaction with respect to the shop in dispute between the parties concerned. The story of vacating the premises on expiry of one year in case of non-payment of Rs.30,000/- does not find place in the objection filed by the present petitioner-original defendant No.2. On the contrary, there is an admission that there was no transaction with respect to the suit shop. The suit was withdrawn on a statement made by the petitioner-original defendant No.2 by way of pursis that no transaction has been made with respect to the suit shop. If there was any transaction like advancing of loan of Rs.30,000/- the defendants could have put forward the said story and would not have come forward making such a statement. It clearly appears that the pursis Exh.28 was filed in the Court with an ulterior motive and after having the suit got withdrawn, the defendant No.2 entered in the suit premises. The document produced on face appears to be suspicious. Thus, in my view, there is more than a prima facie case to show that the plaintiff-defendant No.1 was in previous possession of the suit shop and he has been unlawfully dispossessed. He has been carrying on business for the last more than 9 years in the said shop as against the present petitioner is carrying on business for the last two months. Thus, the balance of convenience is in favour of the plaintiff. It is stated by the plaintiffs that there are 10 persons in the family and the suit shop is the only source of his livelihood. Irreparable injury would cause to plaintiff which cannot be compensated in terms of money if the possession of the suit shop is not restored to them. Above all, there is a question of public faith. Money and muscle power cannot be encouraged as an alternative for delay in disposal of Rent Act cases. Therefore, no message should be allowed to go that the Courts are helpless even if a person has been dispossessed by another person taking law in his hand as the law is that the Court has no power to grant injunction to restore possession which did not exist on the date of filing of the suit.

7. Considering all the facts of the case, I do not consider it to be a fit case which calls for interference by this Court in exercise of power under Section 115 CPC. This Revision Application is accordingly rejected summarily.

The learned Advocate for the petitioner submits

that the interim relief granted by the First Appellate Court till today, be further extended. I do not consider appropriate to extend the interim relief granted. The prayer is declined.

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msp.